

WD 11 - 2003

State of Idaho

Department of Water Resources

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Date: May 23, 2003

To: Pete Peterson, Watermaster
Bear River WD 11
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From: Dayna Ball
Water Distribution
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Number of Pages including cover sheet: 9

Following is the Memorandum Decision Findings of Fact and Conclusions of Law in the case between Conrad Nebeker and Tracy Baxter issued March 20, 2003. (7 pages) I'm also including the cover sheet from Bruce Larson's law office in case you need to get in touch with anyone there.

I had great success finding information on the new owners of the old Baxter property at 3000 Pegram Rd. in Montpelier. The Bear Lake County Clerk found record of a deed transfer on 5/8/03 from Tracy Baxter to:

North Hills Ltd.
Ure Ranches LLC
661 S Lambert Ln.
Kamas, Ut 84036

I couldn't find a phone number listed for either North Hills or Ure Ranches, but I found the following contact information listed with the Utah State Tax Commission. The phone numbers are for David Ure and J Edwin Ure and came from the Qwest phone book.

North Hills Ltd.
David Ure
661 S Lambert Ln.
Kamas, Ut 84036
(435) 783-4650 and
(435) 783-6850

Ure Ranch
J. Edwin Ure
800 S Lambert Ln.
Kamas, Ut 84036
(435) 783-4639

If we can help with anything else, please don't hesitate to get a hold of us.



A. BRUCE LARSON
Meyers, Thomsen & Larson, PLLP
300 N. Seventh Ave., P.O. Box 4747
Pocatello, ID 83205
Telephone: (208) 233-4121 • Fax (208) 233-4174

FAX COVER SHEET

DATE: May 23, 2003

TO: Dayna Ball
Idaho Dept. Of Water Resources

FAX NO.: 208.327.7866

FROM: Nola

NO. OF PAGES: (Including this cover page) 8

HARD COPY WILL FOLLOW

RE: Nebeker v. Baxter

MESSAGE:

Pursuant to your request, enclosed is the Court's Memorandum Decision Findings of Fact and Conclusions of Law in the above-referenced matter.

IF YOU DO NOT RECEIVE ALL PAGES OF TRANSMISSION PLEASE CALL NOLA AT (208) 233-4121 AS SOON AS POSSIBLE.

The information contained in this transaction is privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited by law. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service.

MAR 21 2003

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

CONRAD NEBEKER and 4 PINES
LIVESTOCK, LC,

Plaintiffs,

-vs-

TRACY BAXTER, JOHN DOES NOS.,
1-2,

Defendants.

Case No. CV-01-00132

**MEMORANDUM DECISION
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The Parties own adjacent ranch property on the Bear River in Bear Lake County near Dingle, Idaho. Part of each ranch property is watered out of the Sorenson ditch, which diverts water from the Bear river on Plaintiff's property and then flows northerly through Plaintiff's property and onto Defendant's property. Both of the Parties irrigate parts of their respective properties from other diversions and claim water rights other than the water right in dispute in this action. That water right is described in the 1924 Preston-Montpelier vs. Dingle Decree and is further described in the 1877 Ola Transtrum right. Ola Transtrum was the apparent historic owner of the parties' respective properties. The

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MEMORANDUM DECISION FINDINGS OF FACT AND CONCLUSIONS OF LAW

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property, irrigated out of the Sorenson ditch, has been owned and operated as a single ranch property and also had been owned and operated as separate ranches as it is today.

The property more recently was owned by the Lazy C-H Ranch but prior to 1991 the mortgage holders including the United States Government and the Federal Land Bank of Spokane succeeded to ownership. In 1991 Baxters purchased a part of the Lazy C-H Ranch and began to rehabilitate the irrigation system including the diversion from the Bear River and ditches which conveyed that water across the Nebeker property to their property. In 1998 Nebeker, now 4 Pines Livestock, LC, also purchased property from the United States Government, which had been part of the Lazy C-H Ranch.

Baxter had been using the Sorenson ditch exclusively before the 1998 Nebeker purchase, but thereafter conflicts arose between the parties as to the use of the water and the use of the Sorenson ditch. On June 7, 2001, Conrad Nebeker, Alvin Shaul and Ryan Shaul filed a complaint against Tracey Baxter in the Small Claims Department of the District Court of Bear Lake County. That claim sought \$4000 for denial of use of irrigation water. Tracy Baxter filed an answer alleging that Nebeker and Ryan Shaul had cut ditch banks in four different locations and prevented irrigation water from reaching the Baxter property. On July 2, 2001, judgment was entered in favor of defendant and neither party appealed that decision. On July 12, 2001, Plaintiff Conrad Nebeker filed the instant action seeking injunctive relief and asserting a claim to the Ola Transtrum right and the use of the Sorenson ditch. Baxter asserted in his answer that the complaint should be dismissed because Plaintiff had elected remedies by filing the earlier small claims action. On January 10, 2002, Baxter moved to strike the complaint on the basis that it was barred by the doctrine of res judicata. Argument on the motion to strike was

heard by the Court on April 16, 2002 and a ruling denying the matter was in part based on the Court of Appeals decision of *Hindmarsh v. Mock*, 2001 WL 521906, which created a policy exception to the doctrine of res judicata involving small claims actions. Trial was thereafter held in this case. The *Hindmarsh* case was subsequently reviewed by the Idaho Supreme Court, which reversed the decision of the Court of Appeals. *Hindmarsh v. Mock*, 138 Idaho 92, 57 P.3d 803 (2002). Thereafter Defendant moved this Court to reconsider the earlier ruling denying the motion to strike the complaint. Both parties, at the courts request, presented written briefs.

Motion to Reconsider

In overruling the Court of Appeals in *Hindmarsh v. Mock*, the Supreme Court of Idaho ruled that there should be no distinction between small claims actions and any other actions for consideration of the doctrine of res judicata. Therein the court stated that, "Under the principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." *Hindmarsh*, 138 Idaho at 94, 57 P.3d at 805 (emphasis added). The court further stated that "res judicata is dependant, not on the form of the proceeding, but rather on whether the judgment is final, valid, and rendered by a court of competent jurisdiction." *Hindmarsh*, 138 Idaho at 95, 57 P.3d at 806. If this were a damage case, Defendant's motion to reconsider would be well taken as the dismissal by the small claims judge as valid and final. That would be so even if actual damages exceeded the jurisdictional amount of that court. *Williams v. Christiansen*, 109 Idaho 393, 707 P.2d 504 (Ct.App.1985). However, the remedy of injunctive relief sought by Nebeker could not have been obtained in small claims court and thus was not a court

of competent jurisdiction as to the remedy sought in this case. Therefore defendant's motion to reconsider is denied.

Error in Decree Property Description

During trial, Plaintiff asserted and the evidence supports that the Ola Transtrum decree described land to be irrigated as located in Sections 1, 2, 26, and 35 of township 15 South. If the decree description were correct, all of the decreed water would benefit only the present Nebeker property. That conclusion is contrary to the evidence that shows that the water was used to irrigate property presently owned by both parties from the time of Ola Transtrum ownership to the present. In addition, the decree specifies that the water is for the irrigation of 400 acres of land within these numbered sections. The evidence is undisputed that there is not 400 acres of the original Ola Transtrum land in Township 15 which could be irrigated from the Sorenson ditch. The evidence presented at trial can lead only to the conclusion that there is a clerical error in the decree and that the property description should have indicated Sections 1 and 2 of Township 15, and Sections 26 and 35 of Township 14. This conclusion made, the decree of 1924 must be corrected to reflect the obvious intent of the decree and the historical understanding of the decree by the parties' predecessors. IDAHO RULES OF CIVIL PROCEDURE 60(a); See also *Wilcox v. Wells*, 5 Idaho 786, 51 P. 985 (1898); *Thorn Creek Cattle Ass'n, Inc. v. Bonz*, 122 Idaho 42, 830 P.2d 1180 (1992).

Forfeiture or Abandonment

Defendants assert that Plaintiffs, through non-use for a period of over five years, have abandoned their right to a portion of the decreed water. Idaho Code Section 42-222(2) does provide that a water right may be lost when the water has not been applied

for a beneficial use. Section 42-223 sets forth exceptions to that forfeiture rule. The evidence at trial clearly demonstrates that any lack of water on the Nebeker property while it was in foreclosure or owned by the United States Government was beyond the control of Nebeker. In addition, the beneficial use of the water was resumed by Nebeker after any five year period may have run. There has been no clear and convincing evidence presented whereby this Court could conclude that a forfeiture has taken place under the existing statute and case law.

Historical Use of Decreed Water

The condition of the ditches on the parties' respective property was obvious during the site view by the Court. It was clear and other trial evidence demonstrated that the Baxter property irrigation system was in better repair and up keep. This is consistent with the fact that the Baxter property had been purchased after foreclosure and non-use earlier than the Nebeker property. The evidence is also clear that the irrigation system from the Sorenson ditch had been used to water the Nebeker property prior to Nebeker's purchase and that all that could practicably be irrigated had been irrigated. It is also clear that Baxter has been using some of the decreed water outside of Sections 26 and 35 of Township 14. Baxter asserts that such use is permissible as additional water from the decree conveyed to him at the time of purchase and thus not conveyed to Nebeker later. The evidence does not support that conclusion and this Court must conclude from that evidence that at the time both parties received their respective properties, the grantor conveyed the water rights of the Ola Transtrum Sorenson ditch decree that was appurtenant to the land in Section 26 and 35 of Township 14 and to the land in Sections 1 and 2 of Township 15.

Apportionment of the Sorenson Ditch Water

Plaintiffs assert that Defendants may not have a right to any of the Sorenson ditch water unless the Court concludes that the decree contains a clerical error and the Court has authority at this time to correct the error. If that error were corrected Plaintiffs propose an apportionment of the water according to a ratio which represents the total acreage owned by the respective parties in Sections 1 and 2 of Township 15 and Sections 26 and 35 of Township 14. That would apportion approximately 60% to Nebeker and 40% to Baxter. Baxter contends that Nebeker has abandoned the water right to that property or that the Sorenson ditch water was conveyed to him to be used on his Section 26 and 35 property as well as on other property he owns.

This Court concludes that the water right from the Sorenson ditch of each of the parties is limited to the four sections mentioned above. The evidence is clear that Baxter's water right from the Sorenson ditch cannot exceed water to irrigate just over 200 acres as that is all of his land that lies in Sections 26 and 35. The evidence is also clear that all of that 200 acres has been and is presently irrigated from the Sorenson ditch. The evidence is not clear however, how much of the Nebeker property in Sections 1 and 2 can or has been irrigated. Clearly some of the land lying east of the Bear river is not practicably subject to irrigation.

The decree also clearly indicates that water was to irrigate land on both sides of the river. Evidence is unclear however as to how much acreage of the Nebeker property can be irrigated from the diversion on the west side of the river.

The Ola Transtrum decree at the diversion for the Sorenson ditch was for 400 acres in four surveyed sections. Only 203 of those 400 acres is owned by Defendant


Baxter. It is uncertain how much of the 522 acres owned by Nebeker was to be irrigated by a decree to irrigate 400 acres. The evidence shows and this Court concludes that the Sorenson ditch water from the Ola Transtrum decree is apportioned one half to Plaintiff Nebeker and one half to Defendant Baxter.

Method of Apportionment

The evidence presented at trial shows that for either party to use the water right the full flow must be used to develop the necessary head or pressure. Therefore the apportionment of the right will be according to turn. This court assumes that water turns every other day would not be an efficient use of the ditch system and therefore, unless either party seeks to present evidence in support of another turn proposal, the parties will alternate weekly during the water season with Plaintiff taking the first week in 2003 and Defendant taking the first week in 2004 and so on.

Therefore, **IT IS HEREBY ORDERED** that damages sought by complaint or counterclaim are denied. Both parties are restrained from interfering with the apportioned water right of the other party. Plaintiff to prepare a form of judgment. Each party to bear their own attorney's fees and costs.

DATED March 20th, 2003.


WILLIAM H. WOODLAND
District Judge